Supreme Court, U.S.
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No. 80-368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals was correct in determining that where the facts show that certain activity eventually found to violate the Federal Election Campaign Act was "considered [by the actor] * * * to be in compliance with the Act" on the basis of a Government audit report that "[a]ny reader * * * would * * * have concluded [found those actions] not objectionable," and where the court concludes that "we cannot say that [the actor's] belief in the legitimacy of [its actions] was unreasonable," the violation is not "knowing and willful" as that term is used in 2 U.S.C. § 437g(a)(7).

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ARGUMENT

1. This case does not, as the petition claims, present a major and recurring question of law but rather turns on its particular facts—facts which from a reading of the relevant cases appear to be all but unique.

The question decided by the court below is:

> [W]hether the imposition of a $10,000 civil penalty under 2 U.S.C. § 437g(a)(7) is *supported by the facts of this case.* Under that section it must be found that there was "clear and convincing" evidence that the violation was "knowing and willful." * * * In the *context of this case,* and the statutory framework, it is clear that a "knowing and willful" violation *must be some-*

> *thing more than is present here.* [Pet. App. 8a; emphasis supplied.]

Yet the petition's statement of the case (Pet. 3-4) does not reveal the particular circumstances that led the lower court to rule as it did. That omission is necessary to preserve an aura of plausibility to this request for review since attention to the facts that actually governed decision compels the conclusions that the result reached is correct and in no way inconsistent with that in any other case at all similar.

The Court of Appeals stated the factual predicate for its conclusion as follows:

> The COPE Education Fund is financed by AFL-CIO general treasury monies derived from union dues and assessments. It is used for non-partisan voter registration, get-out-the-vote drives and communications with union members. COPE-PCC, on the other hand, is a separate segregated fund within the meaning of 2 U.S.C. § 441b and is permitted to make direct contributions to candidates for federal elective office. Its monies may not be derived from any source but wholly voluntary political contributions from AFL-CIO union members * * * [and] in no part by the required dues of members.
>
> As had been a long-standing practice of the AFL-CIO, between 1970 and 1977 several times COPE-PCC transferred money to the COPE Education Fund for use by that fund. It was explained that COPE-PCC funds were idle and useless between elections. On demand of COPE-PCC, funds would be transferred from the Education Fund back to COPE-PCC for its use. At no time did COPE-PCC owe money to the Education Fund: the assistance was entirely one-way. * * * Complete records were kept, and, with one relatively minor exception, the transactions were duly reported to the Office of Federal Elections of the General Accounting Office (GAO) and later to Federal Election commission (FEC or Commission) to which jurisdiction was transferred. * * *

> On November 7, 1974, the GAO issued a report of its Office of Federal Elections on the results of an audit of the AFL-CIO. The purpose of the audit was to review AFL-CIO compliance with the Act. The report noted that there had been a failure to report a transfer of $1,500 from COPE-PCC to the COPE Education Fund. The report went on to say that an amended report had been filed to correct the discrepancy and that no further action was recommended. Any reader aware that the transfer referred to was one of several would, we think, have concluded that if reported the transfers were not objectionable. [Pet. App. 4a-5a.]

The court below then went on to detail the proceedings in this litigation:

> On August 23, 1977, the Federal Election Commission, which had succeeded to the GAO's authority, notified the AFL-CIO that it was taking the position that while § 441b of the Act permits transfers of funds from COPE-PCC to the COPE Education Fund, no transfers back into COPE-PCC were permissible.
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> * * * [T]here was a period of attempted reconciliation as required by * * * the Act * * * [and] the Commission rejected a proposed settlement which would have allowed a single transfer of $312,000 from the Education Fund to COPE-PCC * * *; the Education Fund holding at that time that sum of COPE-PCC funds.
>
> The FEC [then] brought an enforcement action [and] it was conceded by counsel for the Commission "* * * we are not attributing a direct mal-feasance [sic] on the part of the AFL-CIO." No express provision violated by the transfers was pointed out and the transcribed remarks of the District Judge show he thought the wrong was principally to the political contributors, not the regular dues payers, * * *. We agree with the District Judge that under the law no part of the monies of a union's segregated political fund should be co-mingled with regular dues money, even temporarily, but the statute is not specific as to what is to be segregated from what. The conclusion is a matter of reading the statute in light of the common law rather than direct statement, but it is not challenged, as it was below. The class the statute was

> written to protect clearly was the regular dues payers, not the political contributors, and in view of the obviousness of this, the error of the appellant, though an error, still is understandable. [Pet. App. 6a-7a.]

Finally, the lower court in applying the "knowing and willful" standard to these facts emphasized:

> [E]very indication is that the AFL-CIO considered itself to be in compliance with the Act. It learned nothing to the contrary from the GAO upon the occasion of the latter's audit. The fact that the AFL-CIO was routinely reporting the inter-fund transfers to the very agency charged with enforcement of the Act is persuasive evidence of a lack of intent to violate the Act's prohibitions. * * *
>
> In addition to a lack of evidence that the AFL-CIO acted otherwise than in good faith, we can not say that their belief in the legitimacy of the inter-fund transfers was unreasonable. Neither the Act nor any court decision had addressed the immediate issue. Most telling is the fact that the audit by the Office of Federal Elections of the GAO, two years after the decision in *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385 (1972) [the decision relied on by the FEC as its predicate for charging a violation] had noted the transfers and did not indicate disapproval in any way. * * *
>
> [W]hat we have here [is] a breach of law by mistake, not by willful wrong. [Pet. App. 9a, 10a, 12a.]

In its petition the FEC cites the authoritative legislative explanation of 2 U.S.C. § 437g(a)(7) which states that to secure a civil fine the Commission must provide "clear and convincing proof that the acts were committed with * * * *a recognition that the action is prohibited by law.*" (H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4 quoted with emphasis at Pet., 11.) That legislative history demonstrates that no such fine could be levied in this case. For the "knowing and willful" standard of the Federal Election Campaign Act as thus explained by Congress cannot be stretched to include actions such as that here, which after

a painstaking review of the facts are found to have been "considered [by the actor] * * * to be in compliance with the Act" on the basis of a government audit report that "[a]ny reader * * * would * * * have concluded [found those actions] not objectionable" and where the court concludes that "we cannot say that [the actor's] belief in the legitimacy of [its actions] was unreasonable." (Pet. App. 7a, 9a, 10a.)[1]

2. The petition's conflict-in-decisions claim (Pet. 5-10) is spurious.

First, so far as the petition shows, or we are aware, neither this Court nor any other Court of Appeals has had the occasion to construe 2 U.S.C. § 437g(a)(7)—the provision in question—much less to differ with the court below as to the section's meaning.

Second, the petition assumes that a divergence in the construction of "willful" in other statutes and the decision below, if it existed, would necessarily create a conflict. That assumption is false for the reason stated in *Civil Aero. Bd.* v. *Delta Air Lines*, 367 U.S. 317, 328:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against. [Quoting Cook, *The Logical and Legal Bases of the Conflict of Laws*, 159.]

As we have shown, the conclusion of the court below that the facts in this case do not come within the standard of 2

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[1] As the Court of Appeals noted, while the District Court levied the exact fine sought by the Commission, the trial judge "stated the terms of [the] order from the bench * * * [a]t the close of the hearing * * * [and] without any discussion at all." (Pet. App. 7a, 12a.)

U.S.C. §437g(a)(7) as Congress explained the scope of that standard is correct. How the willfulness standard should be applied in other statutes raises separate issues concerning the proper interpretation of those statutes.

Third, even if the assumption that the term "willful" has the same meaning in all statutes were correct, so far as the petition shows, or we are aware, there is not a case under any statute holding that facts such as those here constitute "clear and convincing proof" as a "knowing and willful" violation.

Fourth, the conflict argument rests on the premise that the various statements of the limits of "knowing and willful" quoted by the Commission here (Pet. 5-10) constitute differing views on where to draw the line, rather than differing formulations all of which attempt to demarcate an agreed-upon line as precisely as possible. The assertion premises that the cited cases represent a disagreement in principle is rebutted in *Babcock & Wilcox Co.* v. *Occupational Safety, Etc.*, 622 F.2d 1160, 1167-1168 (C.A. 3):

> The *supposed* conflict among the circuits on this point has been generated by several courts of appeals reading into our *Irey* definition a requirement that the employer act with "bad purpose." Read in this fashion, *Irey* has not been followed by some circuits. These courts had adopted various definitions, generally holding that willful means an act done voluntarily, with either an intentional disregard of, or plain indifference to, OSHA requirements. *See, e.g., National Steel and Shipbuilding Co.* v. *OSHRC*, 607 F.2d 311, 313-16 (9ts Cir. 1979). In *Cedar Construction Co.* v. *OSHRC*, 587 F.2d 1303 (D.C.Cir. 1978), the Court of Appeals for the District of Columbia Circuit, an ever-available forum under the statute, concluded that *there is little, if any, difference between our approach and that taken by these other courts. Id* at 1305. We agree.
>
> To our way of thinking, an "intentional disregard of OSHA requirements" differs little from an "obstinate

> refusal to comply''; nor is there in context much to distinguish ''defiance'' from ''intentional disregard.'' ''Flaunting the act'' or ''flouting it,'' as some would say, again carries the same meaning. We also believe, as does the District of Columbia Circuit, that *the same results would likely be reached in various cases, including the one here, regardless of the verbiage utilized. Id.* For example, in *Irey* the Commission had affirmed a willfulness finding where a hearing officer equated the term with negligence. That, of course, would be inconsistent with the approach of any court to the definition of willful under OSHA. It is not unusual that different words are used to describe the same basic concept. Our literature would indeed be sterile if that were not the case. [Emphasis supplied; footnotes omitted.]

Plainly, where the lower courts are merely using ''different words * * * to describe the same basic concept'' in an effort to find the soundest means of articulating that concept and are doing so in a context where ''there is little if any difference in [the] approach[es] taken'' and ''the same results would likely be reached in various cases'' there is no conflict between the circuits.

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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